Supreme Court, U.S.
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NO. 02 - 1516

IN THE

Supreme Court of the United States

ISI INTERNATIONAL, INC.
Petitioner,

v.

BORDEN LADNER GERVAIS, LLP and BORDEN ELLIOT SCOTT & AYLEN (formerly Scott & Aylen)
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF ISI INTERNATIONAL'S PETITION FOR FOR A WRIT OF CERTIORARI

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INTRODUCTION

Rather than addressing the questions presented in ISI's petition for a writ of certiorari, Respondents have attempted to revise them. However, ISI's petition involves two very specific questions of law, namely:

> whether misrepresentations, which would otherwise be actionable under section 43(a)(1)(B) of the federal Lanham Act, are not actionable if they are made in unsolicited letters to the plaintiff's customers,

and

> whether a United States citizen, domiciled abroad, who voluntarily continues to claim, maintain, exercise and enjoy the rights and benefits of citizenship in a particular state, (*i.e.* by continuing to vote in that state's elections for federal offices) can, at the same time, disclaim citizenship in that state for the purpose of defeating diversity jurisdiction.

Although Respondents claim that "this case would be a poor vehicle for addressing petitioner's questions," it is unlikely that these two questions will soon come before This Court again as clearly framed as they are by the undisputed facts in this case.

In opposing ISI's petition, Respondents have also devoted a substantial portion of their brief to a discussion

of the merits of ISI's underlying case against them. It is, therefore, tempting to respond to their discussion and to unwind their spin on ISI's case against them. However, it is unnecessary to do so in this Reply, because the parties' underlying dispute is not really relevant to the consideration of the two questions of law raised in ISI's petition for a writ of certiorari.

DISCUSSION

A. Respondents' Alternate Construction Of The Seventh Circuit's Ruling

In opposing ISI's petition, Respondents argue that the court of appeals did not affirm the dismissal of ISI's complaint on grounds other than *forum non conveniens*. Rather, they argue, the court of appeals affirmed the dismissal of ISI's complaint on *forum non conveniens* grounds, based on other factors not previously considered by the district court.

Characterizing the issues raised in ISI's petition as simply factors in a *forum non conveniens* analysis does not, however, diminish in any way the need for This Court to address those issues. More importantly, however, Respondents' alternate construction of the seventh circuit's ruling suffers from a fatal internal inconsistency.

Even though a district court has subject matter jurisdiction, personal jurisdiction over the parties and venue is proper, it may, in appropriate circumstances as

outlined in *Piper* and *Gilbert*, resort to dismissal of a complaint on *forum non conveniens* grounds. However, if a district court does not have subject matter jurisdiction (as the court of appeals concluded in this case) then that district court would not have the jurisdictional authority to rule on the issue of *forum non conveniens*.

B. The Factual Record Now Before This Court

In opposing ISI's petition, Respondents argue that the "Lanham Act issue was clearly not a central issue in the district court proceeding." However, Respondents chose to raise that issue in their briefs to the seventh circuit, and that issue was clearly "central" to the seventh circuit's affirmation of the dismissal of ISI's complaint.

Respondents also claim that the record is insufficient to enable this court to rule on the Lanham Act question. To the contrary, all of the dispositive facts necessary to the consideration of that issue are fully established in the record, and, more importantly, those facts are not disputed.

C. The Issue of Diversity Jurisdiction

The question of diversity jurisdiction arises only if it is determined that the court of appeals was correct in holding that ISI's complaint does not state a viable claim under section 43(a)(1)(B) of the federal Lanham Act. Respondents argue that because one of their partners, Ms. Brown, is a United States citizen domiciled in Canada,

she cannot be regarded as a citizen of any particular state for purposes of diversity jurisdiction. However, Ms. Brown has also confirmed that she has continued to claim the rights of citizenship in the state where she previously resided by continuing to vote, via absentee ballots, in that state's federal elections.

If United States citizens, domiciled abroad, who choose to legally claim, maintain, exercise and enjoy the rights of citizenship in the state where they previously resided, are not to be regarded as citizens of that state for purposes of diversity, then they are to be denied what Chief Justice Marshall termed their "constitutional right to come into the courts of the Union."

In an age when many United States citizens find themselves domiciled in foreign countries, the answer to this question is of very real importance, and this question could not be more precisely framed for consideration by This Court, than by the undisputed facts in this case. Moreover, no court, other than the United States Supreme Court is better suited to answer that question.

CONCLUSION

Therefore, it is respectfully submitted that, notwithstanding the objections raised by Respondents, ISI's petition for a writ of certiorari should be granted.

May 2003

Respectfully submitted,

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